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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR TINOCO,

Defendant and Appellant.

D059560

(Super. Ct. No. SCN268315)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed.

Defendant Oscar Tinoco pleaded guilty to two counts of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a),<sup>1</sup> counts 1 & 2), one count of hit and run with death or permanent serious injury (Veh. Code, § 20001, subd. (b)(2), count 3), one count of causing bodily injury while driving under the influence (Veh. Code, § 23153, subd. (a), count 4), and one count of driving with a measurable blood

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

alcohol causing injury (Veh. Code § 23153, subd. (b), count 5.) Tinoco also admitted causing great bodily injury to one person in connection with count 1, and more than one person in count 4 (§ 12022.7, subd. (a)), and causing bodily injury to more than one person in connection with count 5 (Veh. Code, § 23558). The court sentenced him to prison for a total term of 15 years.

On appeal, Tinoco contends that the court erred by allowing and relying on certain factors in aggravation presented at sentencing. We affirm the judgment.

### FACTS

On October 10, 2009, Tinoco was driving a car that collided with a car stopped on an overpass in the slow lane of the freeway. The car had just been in another accident, and the passengers, four marines, were inspecting the damage and awaiting emergency vehicles. Tinoco's car collided with theirs, causing his car to turn and hit two of the marines, Robert McBee and Robert Austin. McBee was knocked into a concrete barrier and Austin was knocked off the overpass and onto the street below, resulting in his death. Following the collision, Tinoco and his passenger got out of his car and ran away from the accident, leaving the car stopped on the freeway without any lights on. Another car then collided with Tinoco's car, causing the other car to drive off the freeway into an embankment. The driver of that car, Sara Garcia, was killed.

The police found Tinoco and his passenger running northbound on the shoulder of the freeway and stopped them for questioning. Both Tinoco and his passenger appeared to be under the influence of alcohol and, about two hours after the accident, a blood sample taken from Tinoco tested positive for alcohol.

The San Diego District Attorney filed a five-count complaint against Tinoco. While in custody for this incident, Tinoco was charged with vandalism (§ 594, subds. (a), (b)(1)) for carving his gang symbol and moniker into three windows, two mirrors, and one door of the jail.

After a conditional examination and a preliminary hearing, Tinoco pleaded guilty to all counts and allegations connected to the October 2009 incident. In exchange for his guilty plea, the court dismissed the vandalism case pending against him.

At sentencing, the court considered several factors in aggravation as well as factors in mitigation. Tinoco's counsel presented evidence of mitigation, including Tinoco's young age at the time of the incident, his lack of a criminal record, plea of guilty, remorse, and family support. The prosecutor began her case in aggravation by allowing several of the victims' friends and family members to address the court. She asked the court to consider evidence in aggravation, including the fact that Tinoco fled the scene after the accident, left his car in the road with no lights on, and vandalized the jail with his gang moniker and symbol while in custody for these crimes. She also presented to the court Tinoco's MySpace page, which referenced his gang affiliation and activities. Tinoco's counsel objected to the presentation and consideration of the website because it had not been authenticated and had been disclosed to defense counsel only shortly before the sentencing hearing.

The court sentenced Tinoco to the upper term of 10 years for count 1, one-third the middle term for count 2 (two years), and an additional three years for the great bodily injury enhancement connected to count 1, for a total term of 15 years. The court stayed

counts 4 and 5 under section 654 and imposed a term for count 3 to run concurrently to the sentences imposed for counts 1 and 2.

In determining the appropriate sentence, the court delineated all factors in aggravation and mitigation it considered. As factors in mitigation, the court considered Tinoco's young age, remorse, and lack of a criminal record. The court did note that although Tinoco had no criminal record, his behavior while in jail suggests some gang affiliation, which the court found "disturbing and distressing." As factors in aggravation, the court considered the pain experienced by the victims' family and friends, Tinoco's decision to drive while under the influence of alcohol, the vulnerability of the victims, the 18-year sentence recommended in the probation report, and the "nature and circumstances surrounding the terrible decision that Mr. Tinoco made in leaving his vehicle . . . [and] the scene." The court relied primarily on Tinoco's decisions to leave his vehicle and the scene when it selected the upper term for count 1.

## DISCUSSION

Tinoco contends the court abused its discretion when it allowed improper evidence of aggravating factors at sentencing. Tinoco argues the MySpace page detailing his gang affiliation was presented without his prior knowledge and he was not given an opportunity to respond to it.

At sentencing, the court may consider an array of evidence, including "the record in the case, the probation officer's report, other reports, . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing

hearing." (§ 1170, subd. (b).) However, "[a] court's reliance, in its sentencing and probation decisions, on factually erroneous sentencing reports or other incorrect or unreliable information can constitute a denial of due process." (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.)

The presence of erroneous sentencing information in the record will require reversal only if the trial court relies on that information in selecting its sentence. (*People v. Tang* (1997) 54 Cal.App.4th 669, 678-680.) Even if the sentencing court relies on some improper evidence, the sentence will be set aside "only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Jones* (2009) 178 Cal.App.4th 853, 861 (*Jones*).)

If the record does not show the court relied on the erroneous information, we will likely affirm the sentence. (*People v. Bustamante* (1992) 7 Cal.App.4th 722, 726-727.) Only one factor in aggravation is needed to warrant the court's selection of the upper term. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 963; *People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Burch* (2007) 148 Cal.App.4th 862, 873.)

Because the court can exercise broad discretion when selecting a sentence (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; *People v. King* (2010) 183 Cal.App.4th 1281, 1323), we review the court's decision to impose a particular sentence for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377; *Jones, supra*, 178 Cal.App.4th at pp. 860-861.) Abuse will only be found if the court's "decision is so

irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at p. 377; *Jones*, at pp. 860-861.)

Here, there is no indication the court relied on the challenged information. (*People v. Tang*, *supra*, 54 Cal.App.4th at pp. 678-680; *People v. Bustamante*, *supra*, 7 Cal.App.4th at pp. 726-727.) The court articulated all factors it considered and made no mention of the MySpace page. In selecting the upper term for count 1, the court stated that it based its selection on Tinoco's decision to leave his vehicle and his decision to leave the scene. Although the court mentioned that it relied on "other aspects of this case," the long list of factors it had presented before making its sentencing choice did not include the MySpace page. The court's only mention of Tinoco's possible gang affiliation was in reference to the "behavior that [Tinoco] engaged in in the jail" and some statements presented in the probation report. The court did not mention any gang references presented by the prosecution, suggesting it did not rely on the erroneous information.

Even had the court considered the challenged information as a factor in aggravation, it is not reasonably likely that it would have selected a lesser term without it. Numerous other factors in aggravation were supported by the evidence in the record. (*People v. Price*, *supra*, 1 Cal.4th at p. 492; *Jones*, *supra*, 178 Cal.App.4th at p. 861.) One aggravating factor is enough to justify the selection of the upper term, and here the court considered several. (*People v. Kellett*, *supra*, 134 Cal.App.3d at p. 963.) Also, because the court already knew of a possible gang affiliation through Tinoco's vandalism

case, any further consideration of Tinoco's gang affiliation in reference to the improper MySpace page would not have been prejudicial.

Tinoco's reliance on *People v. Stanley* (1984) 161 Cal.App.3d 144 is misplaced. In *Stanley*, the Court of Appeal reversed the sentence imposed because the court had considered an unreliable sexual abuse report. (*Id.* at pp. 155-156.) The sentencing court in *Stanley* made it clear that it relied primarily on the report in selecting its sentence. (*Id.* at pp. 150-151, 155-156.) Here, in contrast, the court did not use the challenged evidence, and instead delineated all factors in aggravation it considered in making its sentencing choice.

Based on the unchallenged information in aggravation presented to the court, we cannot conclude that its "decision [was] so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377; *Jones, supra*, 178 Cal.App.4th at pp. 860-861.) There is no indication the court relied on any improper information in making its sentencing choice. The presence of several other factors in aggravation justifies the court's selection of the upper term.

#### DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.